IN THE

SUPREME COURT OF THE UNITED STATES

****

NO. 80-6451

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SUPREME COURT, U.S.

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WILLIAM JAMES GIBSON,
Defendant-Petitioner

VERSUS

STATE OF LOUISIANA,
Plaintiff-Respondent

****

RESPONSE IN OPPOSITION TO A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

****

WILLIAM J. GUSTE, JR.
ATTORNEY GENERAL
STATE OF LOUISIANA

BARBARA R. RUTLEDGE
ASSISTANT ATTORNEY GENERAL
STATE OF LOUISIANA

JOHNNY C. PARKERSON
DISTRICT ATTORNEY
FOURTH JUDICIAL DISTRICT
MONROE, OUACHITA PARISH, LOUISIANA

JOHN R. HARRISON
ASSISTANT DISTRICT ATTORNEY
POST OFFICE BOX 1652
MONROE, LOUISIANA 71201

TABLE OF AUTHORITIES

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STATEMENT OF FACTS

MAY IT PLEASE THE COURT:

On January 15, 1975, Officers of the Monroe Police Department received a call to check on a reported armed robbery at the 7-11 on South Second and Winnsboro Road, Monroe, Louisiana. The Officers arrived at the store and discovered Mrs. Patsy F. Griffin being attended to by customers for injuries she had received in the armed robbery which Officers had been called upon to investigate. Mrs. Griffin told these Officers that an individual had entered the store and after customers had left, approached her from behind. As Mrs. Griffin turned to face this individual she was hit in the face with a "slapper" and knocked down. After the victim was knocked down she was told to get up and open the cash register which she did. She was then told to lay down on the floor and did so. The suspect took $64.36 and left the store. The suspect was described by the victim as being a dark skinned black male of small frame, and about 5 feet 8 inches to 5 feet to 9 inches tall who was wearing a white shirt with maroon pants. The shirt was further described as a knit pullover having a red ring around the collar and a red ring around each sleeve. The suspect was also described as having on black tennis shoes with white soles. The weapon was described by the victim as being a leather object which was round on the end and flat on the sides. It was carried in the suspect's pocket prior to the robbery.

On January 21, 1975, Detectives from the Monroe Police Department went to the residence of Mrs. Griffin to show her six (6) polaroid color potographs. The fifth photograph was that of petitioner Willie James Gibson. Upon viewing these photographs Mrs. Griffin picked out the photograph of Willie James Gibson as being the person who had struck her and removed the money from the cash register.

On January 27, 1975 Willie James Gibson was removed from the Monroe City Jail and taken to the Ouachita Parish Jail to be viewed in a line-up by the victim, Mrs. Griffin. He was placed in the line-up with five (5) other individuals of similar appearance. He was in the number two (2) position in the line-up. Mrs. Griffin picked out Willie James Gibson as being the person who had hit her and subsequently taken the money from the store.

A Bill of Information was filed on February 3, 1975, charging Willie James Gibson with armed robbery. Willie James Gibson was tried on March 6, 1975 and found guilty as charged. On April 24, 1975, Willie James Gibson was sentenced to serve fifteen (15) years at hard labor and given credit for time served.

From this conviction Willie James Gibson has filed this Petition for a Writ of Certiorari.

1

Petitioner first asserts that there was insufficient proof of his guilt beyond a reasonable doubt. This Honorable Court has allowed review by Habeas Corpus proceedings of a state prisoner's claim that his conviction was based on evidence which was not adequate to prove guilt beyond a reasonable doubt. Jackson v. Virginia, U.S. Va. 99 S. Ct 2781 443 U.S. 307, 61 L. Ed 2d 560 (1979) reh den 100 S. Ct 195. However, that decision requires relief only if "....it is found that upon the record evidence adduced at the trial no rational Trier of fact could have found proof of guilt beyond a reasonable doubt." Jackson v. Virginia, Supra @ 99 S. Ct. 2792. Further, record of the evidence must be reviewed "....in the light most favorable to the prosecution." Jackson v. Virginia, Supra @ 99 S. Ct. 2792.

Armed robbery in Louisiana is defined under Section 14:74 of the Louisiana Revised Statutes as "....the theft of anything of value from the person of another, by use of force or intimidation, while armed with a dangerous weapon."

The victim identified Willie James Gibson by photographic line-up, by a corporeal line-up, and in court as the individual who had struck her with a "slapper" and who had taken $64.36 from the store.

A review of the trial transcript shows that a rational trier of fact could find the petitioner guilty beyond a reasonalbe doubt based on the evidence presented.

2

Petitioner's second objection concerns introduction of evidence of a photographic line-up at trial. No objection was made to the intorduction of the photographic line-up (page 111, trial transcript) nor was any objection offered as to State's testimony with regard to the identification of the defendant. Article 841 of the Louisiana Code of Criminal Procedure provides in part: "an irregulatiry or error cannot be availed of after verdict unless it was objected to at the time of occurence....." The Louisiana Supreme Court has upheld this statute saying "where there is no contemporaneous objection, the defendant cannot complain of an alleged error or irregularity in the proceedings after the verdict has been rendered". State v. Williams, Sup. 1977, 343 So 2d 1026, Cert. denied 98 S Ct. 412, 434 U.S. 928 54 L Ed 287. This rule has been applied to Louisiana to a victim's in-court identification where no objection was made at trial to any of victims identification. See State v. LeCompte, Sup. 1978, 371 So. 2d 339. Article 841 of the Louisiana Code of Criminal Procedure conforms generally with Rule 51, Federal Rules of Criminal Procedure. Issues which are not objected to

during trial which do not constitute clear error are waived and cannot be raised on appeal. See, State v. Maddox 492 F 2d 104 (5th Cir. 1974), United States v. Gutierrez 560 F2 195 (5th Cir. 1977).

United Stated v. Ceuto, 611 F 2d 1056 @ 1063-1064 (5th Cir. 1980) stated, "The due process standard for reviewing photographic identification procedures constitute a two-part test. The court must first decide whether the photographic display was impermissibly suggestive. If the court concludes that the display was suggestive, it must then determine whether the procedure creates a substantial likelihood of misidentification. Reliability is the linchpin in determining the admissibility of identification testimony". (citations omitted). In the instant case, unlike Cueto, Supra, officers presented the victim with an array of six (6) similar photographs depicting different individuals.

Although a defendant has been arrested, a photographic line-up may be used if it is otherwise reliable. United States v. Higginbotham, 539 F 2d 17 (9th Cir. 1976).

3

Petitioner now asserts that his trial counsel was incompetent. "Claims of ineffective assistant of counsel require an inquiry into the actual performance of counsel and the determination whether representation was reasonably affective must be based on the totality of the circumstances". Beckham v. Wainwright, 639 F 2d 262 (5th Cir. 1981). Petitioner suggests that one of the basis which tends to show that his court appointed counsel was incompetent is that he filed no pretrial motions. A hearing on an Application for a Writ of Habeas Corpus was heard in the Fourth Judicial District Court, Parish of Ouachita, State of Louisiana, on August 18, 1978 and evidence was adduced on this point. Counsel for the defendant testified that he filed no motions "based on the examination of the case" (transcript of testimony at hearing of Application for a Writ of Habeas Corpus, Page 3 Line 4). Petitioner is under the mistaken belief that counsel is required to file pretrial motions in every case. That is not so, "....counsel must use 'professional discretion in deciding whether there was sufficient grounds' for such a motion". U.S. v. Aulet 618 F2 182 (2nd Cir. 1980) Petitioner also notes that his attorney did not locate all of his witnesses. His attorney testified that he was only given the names of possible witnesses and he made substantial effort to locate these persons (Transcript of testimony at hearing of Application for a Writ of Haveas Corpus Page 4, Line 20). A review of testimony of witnesses at trial shows that these witnesses did little to support defendants testimony. The testimony of missing witnesses would only be cumulative to the witnesses that testified. Petition further states that objections were not made to certain items of evidence in-

troduced at trial by the State. His counsel stated that he did not do so because he felt that the evidence was favorable to the defendant . (Transcript of testimony at hearing of Application for a Writ of Habeas Corpus, Page 6 Line 16). Petitioner also objects that his counsel "did not strategically question" the victim. Petitioner is not entitled to a perfect attorney. One court has held in the regard, "the sixth amendment guarantees....'reasonably competent and effective representation of counsel'. (Petitioner) is not, however, entitled to an attorney who will make no mistakes". U.S. v. Campbell 616 F2 11511, (9th Cir. 1980). Another Federal Court discussing adequacy of legal counsel has siad, "one who claims such a deprivation (of right to adequate counsel) faces a heavy burden. Adequacy of legal representation is measured neither by hindsight nor success. The standard of adequacy of counsel....is that a defendant will be considered to have had adequate counsel unless counsel's representation at trial was of such a substandard level as to render the trial a mockery of justice and a sham...." U.S. v. Nelson 582 F2 1246 @ 1250 (10th Cir. 1978). A review of the trial transcript and the transcript of hearing by the trial court of the Application for a Writ of Habeas Corpus show that petitioner was adequately represented.

CONCLUSION

It is respectfully submitted that the petitioner's present Application for a Writ of Habeas Corpus is without merit and should be denied.

Respectfully submitted,

WILLIAM J. GUSTE, JR.
ATTORNEY GENERAL
STATE OF LOUISIANA

BARBARA RUTLEDGE
ASSISTANT ATTORNEY GENERAL
STATE OF LOUISIANA

JOHNNY C. PARKERSON
DISTRICT ATTORNEY
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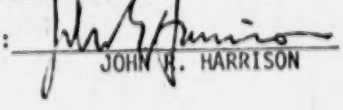
MONROE, OUACHITA PARISH, LOUISIANA

JOHN R. HARRISON
ASSISTANT DISTRICT ATTORNEY
FOURTH JUDICIAL DISTRICT
POST OFFICE BOX 1652
MONROE, LOUISIANA 71201

BY: 
JOHN R. HARRISON